Boustead Pelita Tinjar Sdn Bhd (formerly known as Boustead Pelita Plantation Sdn Bhd) v Gerunsin ak Nawek & Ors

HIGH COURT (MIRI) — SUIT NO MYY-22–24/8 OF 2012
STEPHEN CHUNG J
29 SEPTEMBER 2014

Civil Procedure — Action — Committal proceedings — Application for — Interlocutory injunction granted to restrain defendant from entering, occupying or trespassing land — Allegation that defendant disobeyed and in breach of injunction order — Whether notice to show cause and court order served on defendant regularly

The High Court had granted an interlocutory injunction order that the defendants be restrained until after the trial/judgment/further order from entering, occupying or trespassing on a piece of land. The plaintiff contended that the first defendant had disobeyed and was in breach of the terms of the injunction order, continued to disobey and was in breach of the terms of the injunction order. The plaintiff contended that it had issued and served a notice to show cause personally on the first defendant but the first defendant failed to respond to it. The estimated loss from such illegal harvestings by the first defendant and the residents of RH Balang and or his servants or agents amounted to 5,864.60mt or in the sum of RM2,604,056.30. The defendants allegedly continued to illegally harvest despite knowing that there was an injunction order to restrain them from harvesting. This was the plaintiff's application to commit the first defendant for failure to comply with or for committing a breach of the court order and that the costs of the application be borne by the first defendant.

Held, dismissing the application with costs of RM10,000:

(1) The standard of proof required in contempt of court proceedings is proof beyond reasonable doubt. Where there is any doubt, such doubt ought to be resolved in favour of the alleged contemnor. The evidence when considered in its totality has to establish beyond reasonable doubt the guilt of the contemnor. The affidavit of service stated that the court order and notice to show cause was handed to the first defendant personally. The acknowledgement was type-written but did not state that the court order and notice to show cause on the first defendant was served or that the first defendant had received the court order and or the notice to show cause (see paras 11–12).

(2) The plaintiff failed to prove its case against the first defendant in the committal proceedings beyond reasonable doubt. There was discrepancy between what was stated in the affidavit of service and the acknowledgement. The plaintiff did not explain this discrepancy nor did it call the relevant witness who served the documents. In the absence of such explanation, the first defendant had raised a serious doubt that he had not been served with the court order and notice to show cause. Any benefit of the doubt must be given to the first defendant (see paras 15 & 20).

[Bahasa Malaysia summary

Mahkamah Tinggi telah memberikan perintah injunksi interlokutori bahawa defendan-defendan dihalang sehingga selepas perbicaraan/penghakiman/perintah lanjut daripada memasuki, menduduki atau menceroboh ke atas sebidang tanah. Plaintif berhujah bahawa defendan pertama telah mengingkari dan melanggar terma-terma perintah injunksi, berterusan mengingkari dan melanggar terma-terma perintah injunksi. Plaintif berhujah bahawa ia mengeluarkan dan menyerahkan notis untuk menunjukkan tunjuk sebab secara peribadi ke atas defendan pertama tetapi defendan pertama gagal untuk menjawabnya. Anggaran kerugian daripada penuaian secara haram sedemikian oleh defendan pertama dan penduduk-penduduk RH Balang dan atau pembantu-pembantu atau ejen-ejennya berjumlah kepada 5,864.60 metrik tan atau dalam jumlah sebanyak RM2,604,056.30. Defendan-defendan didakwa berterusan menuai secara haram meskipun mengetahui bahawa terdapat perintah injunksi untuk menghalang mereka daripada menuai. Ini adalah permohonan plaintif untuk meletakkan defendan pertama bagi kegagalan mematuhi atau melakukan kemungkiran perintah mahkamah dan bahawa kos permohonan ditanggung oleh defendan pertama.

Diputuskan, menolak permohonan dengan kos sebanyak RM10,000:

(1) Standard pembuktian yang diperlukan dalam prosiding penghinaan mahkamah adalah pembuktian melampaui keraguan munasabah. Di mana terdapat apa-apa kesangsian, kesangsian sedemikian patut diselesaikan dalam memihak kepada penghina yang didakwa. Afidavit penyerahan menyatakan bahawa perintah mahkamah dan notis menunjukkan sebab diberikan kepada defendan pertama secara peribadi. Penerimaan adalah bertaip tetapi tidak menyatakan bahawa perintah mahkamah dan notis untuk tunjuk sebab ke atas defendan pertama diserahkan atau bahawa defendan pertama telah menerima perintah mahkamah dan atau notis untuk menunjuk sebab (lihat perenggan 11–12).

(2) Plaintif gagal untuk membuktikan kesnya terhadap defendan pertama dalam prosiding komital melampaui keraguan munasabah. Terdapat percanggahan di antara apa yang dinyatakan di dalam afidavit

penyerahan dan penerimaan. Plaintif tidak menjelaskan percanggahan ini atau memanggil saksi relevan yang menyerahkan dokumen-dokumen tersebut. Dalam ketiadaan penjelasan sedemikian, defendan pertama telah membangkitkan kesangsian serius bahawa dia tidak diserahkan dengan perintah mahkamah dan notis untuk tunjuk sebab. Apa-apa faedah kesangsian mesti diberikan kepada defendan pertama (lihat perenggan 15 & 20).]

Notes

For a case on committal proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 107.

Cases referred to

Capital Insurance Bhd v BS Sidhu [1996] 3 MLJ 1, CA (refd)
Metro Giant Group Sdn Bhd v Gala Sari Resources Sdn Bhd & Ors [2007] 8 MLJ 586; [2008] 7 CLJ 579, HC (refd)
Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112, HC (refd)
Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang [2013] 5 MLJ 541, CA (refd)
Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1995] 3 MLJ 549, SC (refd)

Legislation referred to

Rules of Court 2012 O 52 r 2B

Anastasia Chin Meng Xing (Reddi & Co) for the plaintiff.
Majen Panyog (Padawan Majen & Co) for the first defendant.

Stephen Chung J:

[1] This is the hearing of the plaintiff's application to commit the first defendant Gerunsin ak Nawek for failure to comply with or for committing a breach of the court order dated 9 October 2012 and that the costs of the application be borne by the first defendant. The grounds of the application are set out in the statement and affidavit in support of Zulkiffli bin Wan Ibrahim ('PW1'). The plaintiff called five witnesses for the plaintiff's case and the first defendant was his only witness for the defence.

[2] The grounds on which an order of committal is sought must be set out in the statement accompanying the notice of application. This information must be set out with sufficient particularity and details to enable the person alleged to be in contempt to meet the charge. These requirements must be complied with and be strictly enforced: *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112.

[3] The statement stated that on 9 October 2012 the High Court had granted an interlocutory injunction order that the defendants whether by themselves, their servants or agents otherwise howsoever be restrained until after the trial or judgment or further order from:

(a) entering, occupying or trespassing on Lot 15 Tinjar Land District (subdivided into Lots 2, 3 (now known as Lot 22), 6 and 9 of Block 32) ('Bukit Limau Estate') or any part thereof;

(b) harvesting, cutting or taking away any oil palm fruits or fresh fruit bunch from Bukit Limau Estate;

(c) hindering, interfering, preventing, or otherwise affecting the plaintiff's rights in respect of Bukit Limau Estate, including the right to possession of Bukit Limau Estate for the purpose of developing Bukit Limau Estate into oil palm plantation areas; and

(d) hindering, interfering, preventing, or otherwise affecting the plaintiff's operation of an oil palm plantation and ancillary services on Bukit Limau Estate.

The injunction order was served personally on the first defendant on 4 July 2013.

[4] The plaintiff contended that the first defendant has disobeyed and was in breach of the terms of the injunction order and continued to disobey and was in breach of the terms of the injunction order. The plaintiff contended that it had issued and served a notice to show cause personally on the first defendant on 4 July 2013. The notice to show cause required the first defendant to show cause within two days of the service why he should not be committed to prison or fined for the contempt as set out in the notice to show cause. The plaintiff submitted that the first defendant has failed to respond to the notice to show cause.

[5] PW2 testified that despite the help from the court bailiffs, police officers, his assistants and himself in serving the injunction order against the defendants and explaining the nature of the injunction order to the defendants, they refused to obey the injunction order and continued to illegally harvest FFB in Lot 15 Tinjar Land District. He said he gave instructions to his assistants Kamaruddin bin Daud (PW3) and Noor Ikmal Naim bin Ismail (PW4) to lodge police reports on the illegal harvesting. The police reports were exhibited collectively as 'Z3' in PW1's affidavit filed in support of the application for committal. He said the estimated loss from such illegal harvestings by the first defendant and the residents of RH Balang and or his servants or agents amounted to 5,864.60mt or in the sum of RM2,604,056.30

[6] PW3 testified that the police reports were lodged by him except for police report Long Lama/0001161/13 dated 21 February 2013 which was lodged by PW4. He said the defendants continued to illegally harvest the FFB within Lot 15 Tinjar Land District despite knowing that there was an injunction order to restrain them from harvesting. He said they tried to stop the defendants from illegally harvesting by explaining the injunction order but to no avail.

[7] PW4 took two video recordings of the illegal harvesting by the first defendant and others. The first video was taken on 2 February 2013 and the second video on 20 February 2013. He testified that the videos showed the defendants including the first defendant from Rh Balang illegally harvesting and taking away the FFB from Bukit Limau Estate. He said one video was taken along the plantation road within Bukit Limau Estate and the other video was taken outside their office inside Bukit Limau Estate.

[8] PW4 said the first defendant used a white Toyota Hilux QMS 5021 to bring and transport the illegally harvested FFB from Bukit Limau Estate out of the plantation. He said the first defendant and his people would pass the security guards at the entrance of the plantation but the defendants outnumbered their security guards. He said they could not do much as they feared for their safety because the defendants had weapons with them when they came in to illegally harvest the FFB in Limau Estate. He testified that he lodged a police report Long Lama /000116/13 dated 21 February 2013 against the defendants for illegally harvesting the FFB.

[9] DW1 testified that he has been summoned by the plaintiff to be committed to prison as he had been alleged to disobey a court order issued by the High Court in Miri dated 9 October 2012. He said he had received a writ MYY-22–24/8 of 2012 and nothing else. He said the person who gave him the writ in Suit No MYY-22–24/8 of 2012 did not tell him the content of the documents. He denied the plaintiff's allegation that he did not obey the court order. He said the court order dated 9 October 2012 applied to Lot 15 Tinjar Land District (subdivided into Lots 22) six to nine of Block 32. He said he did not harvest or take away FFB from the areas mentioned in the order.

[10] DW1 testified that based on the police reports dated 13 May 2013, 21 February 2013, 8 February 2013 and 23 January 2013 respectively he was alleged to harvest or take away FFB from Block 21 PM97 and Block 20 PM97 which he denied. He testified that he was never told by any person from the plaintiff about the court order.

[11] The standard of proof required in contempt of court proceedings is proof beyond reasonable doubt. Where there is any doubt, such doubt ought to be resolved in favour of the alleged contemnor. The evidence when considered in its totality has to establish beyond reasonable doubt the guilt of the contemnor: *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1995] 3 MLJ 549; *Metro Giant Group Sdn Bhd v Gala Sari Resources Sdn Bhd & Ors* [2007] 8 MLJ 586; [2008] 7 CLJ 579.

[12] The first issue is whether the plaintiff had served the court order dated 9 October 2012 on the first defendant. Prior to any committal proceedings the court order must be served personally on the alleged contemnor: see *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1. The affidavit of service (encl 29) stated that on 4 July 2013 Mohamad Ismalie bin Yusop served the court order dated 9 October 2012 and notice to show cause dated 4 July 2013 on the first defendant personally. The court order, notice to show cause and the acknowledgement were annexed as exhibits to the affidavit of service.

[13] The first defendant contended that he was not served with the said court order. He said he only received a Suit No MYY-22–24/8 of 2012 and nothing else. He said the process server did not explain the contents of the documents. The first defendant referred to the acknowledgement signed by him attached to the affidavit of service which stated that he admitted that he had received Suit No MYY-22–24/8 of 2012 which was served on him by Mohamad Ismalie bin Yusop on 4 July 2013.

[14] The acknowledgement (*Lampiran A*) was type-written and presumably prepared either by Mohamad Ismalie bin Yusop or by or on behalf of the plaintiff. In *Lampiran A*, the acknowledgement stated that the first defendant had received Suit MYY-22–24/8 of 2012 from Mohamad Ismalie bin Yusop. The acknowledgement did not state that Mohamad Ismalie bin Yusop had served the court order dated 9 October 2012 and notice to show cause on the first defendant or that the first defendant had received the court order and or the notice to show cause.

[15] There is a discrepancy between what is stated in the affidavit of service and the acknowledgement. The plaintiff did not explain this discrepancy. The plaintiff did not call Mohamad Ismalie bin Yusop to testify or to explain whether he had actually served the court order and notice to show cause on the first defendant bearing in mind that the acknowledgement stated that the first defendant only received Suit MYY-22–24/8 of 2012. In the absence of such explanation, the first defendant has raised a serious doubt that he had not been served with the court order and notice to show cause. Any benefit of the doubt must be given to the first defendant.

[16] Further, in all cases of contempt of court, except for contempt committed in the face of the court, a formal notice to show cause why he should not be committed to prison or fined shall be served personally: O 52 r 2B.

[17] In committal proceedings, in this case, the court order granting the injunctions against the first defendant and others must be served personally on the first defendant. It is intended to give notice to him of the injunction order made against him and to give him a chance to comply with the court order. If, after he has been served with the court order, he committed a breach or continued to breach the court order, then a notice to show cause why he should not be committed to prison or fined shall be served personally. Procedural rules governing committal proceedings must be strictly adhered to as the liberty of the individual is at stake: *Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang* [2013] 5 MLJ 541.

[18] In this case, the court order and notice to show cause were allegedly served together on the first defendant on 4 July 2013. Obviously the plaintiff did not comply with the procedures required. The plaintiff by allegedly serving the court order and notice to show cause together did not give any chance or opportunity to the first defendant to comply with the court order or to be given an opportunity to explain whether he had breached the court order on 4 July 2013. The plaintiff in allegedly serving the court order and notice to show cause together on 4 July 2013 had prejudiced and caused injustice to the first defendant.

[19] The four police reports exhibited in 'ZI3' were lodged in January, February and May in 2013 on the illegal harvesting of FFB, prior to the injunction order was served on the first defendant on 4 July 2013. These police reports complained of the breaches of the injunction order which had yet to be served on the first defendant at the material times. As stated above, the first defendant had raised reasonable doubts that he did not know and had not been served with the court order which required him to comply with the court order.

[20] On the evidence adduced, the plaintiff has failed to prove its case against the first defendant in the committal proceedings beyond reasonable doubt. The plaintiff's application is dismissed with costs of RM10,000 to be paid to the first defendant.

Application dismissed with costs of RM10,000.

Reported by Afiq Mohamad Noor